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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

VIRGINIA CARMELO et al.,

Plaintiffs and Respondents,

v.

LINDA CANDELARIA et al.,

Defendants and Appellants.

D052255

(Super. Ct. No. 37-2007-00055441-
CU-DF-NC)

APPEAL from an order of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed.

Plaintiffs and defendants are members of two different groups seeking to lead a Native American tribe known as the Gabrielino-Tongva Tribe (Tribe).¹ After defendants sent Tribe members a letter stating plaintiffs embezzled money from the Tribe and that a

¹ Plaintiffs are: Virginia Carmelo, Martin Alcala, Shirley Machado, Edgar Perez, and Adam Loya. Defendants are: Linda Candelaria, Bernie Acuna, Martha Gonzalez Lemos, Laurie Salse, and Suzanne Rodriguez.

court had ordered plaintiffs to return this money, plaintiffs sued defendants for libel, alleging these statements were false and defamatory.

Defendants responded by moving to strike the complaint under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)² The court denied the motion, finding that although defendants met their burden to show the complaint was governed by the anti-SLAPP statute, plaintiffs established a probability they would prevail on their libel claim. Defendants appeal, contending the court erred in concluding there was a probability plaintiffs would prevail on their claim. We reject this contention and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The following summary is based on the pleadings and the evidence presented in the anti-SLAPP proceedings. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) We state the facts in the light most favorable to plaintiffs, the parties opposing the anti-SLAPP motion. (See *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

The Tribe is a Los Angeles-based Native American tribe that has not been recognized by the federal government. In 2001, plaintiffs were members of the Tribe's governing board (known as the Tribal council).

In February 2001, the Tribe entered into a development agreement with an entity referred to here as SMDC, in which SMDC agreed to assist the Tribe in achieving formal

² All further statutory references are to the Code of Civil Procedure unless otherwise specified.

recognition by the federal government and developing a casino gaming facility in the Los Angeles area. SMDC was wholly owned and controlled by attorney Jonathan Stein, who later became the Tribal development officer. Stein arranged for the Tribe to locate its headquarters in his law office. Stein also assisted the Tribe to form a gaming authority, and became the gaming authority's chief executive officer (CEO).

In April 2006, Stein requested attorney Elizabeth Aronson to work for the Tribe as assistant general counsel. The next month, in May 2006, the Tribe received \$2.15 million in investor funds for a future casino gaming project. The funds were obtained through Stein's efforts.

During the next several months, attorneys Stein and Aronson had numerous disagreements about the management and future direction of the Tribe. Those disagreements came to a head at a September 2006 Tribal council meeting. At that meeting, Stein presented the Tribal council with a resolution terminating Aronson's employment for cause. When the Tribal council members refused to sign the resolution or follow his other recommendations, Stein resigned. Stein then locked the Tribal council out of his office, kept possession of all Tribe books and records, appropriated the Tribe's website, and advised the Tribe's financial institutions to "'freeze'" the Tribe's accounts.

On October 3, the Tribe's new counsel (James McShane of Sheppard, Mullin, Richter & Hampton) sent Stein a letter stating the Tribe was accepting his resignation and/or terminating him as CEO of the Tribe's gaming authority, and terminating the

SMDC development agreement under a termination provision in the agreement. The Tribal council replaced Stein with former state Senator Richard Polanco as CEO.

Stein, however, continued to refuse to return any of the Tribe's financial, business and membership records. On October 12, Stein sent a mass mailing to the Tribal membership attempting to solicit support from Tribe members to urge the Tribal council to reappoint Stein as CEO and to support a recall election of the Tribal council members. This recall effort was unsuccessful. At about the same time, Stein enlisted several other Tribe members to serve on a committee he called the "'financial oversight committee.'"

The next month, in November 2006, the Tribal council held a general membership meeting, during which the Tribal council members (plaintiffs) explained the budget and discussed their expenditures of Tribe funds. Several defendants attended this meeting and heard plaintiffs explain the Tribe-related purposes for the expenditures.

In response to Stein's actions, the Tribe filed a lawsuit in Los Angeles County Superior Court against Stein and SMDC. The amended complaint alleged conversion, breach of fiduciary duty, breach of contract, and legal malpractice. Shortly after, SMDC filed a lawsuit against the Tribe, the investor group, the Sheppard Mullin law firm, the five individual members of the Tribal council (plaintiffs in this case), Aronson, and former Senator Polanco. SMDC alleged numerous claims, including breach of contract, interference with contractual relations, and fraudulent conveyance. The two lawsuits were later consolidated (the Los Angeles litigation).

The Tribal council then relocated the Tribe's headquarters to an office in downtown Los Angeles and continued to serve as the governing board for the Tribe. But

in March 2007 Stein (via SMDC) obtained a court order for a pretrial attachment of \$812,500 in assets held by the Tribe pending the completion of the Los Angeles litigation. (See § 484.010.) Stein told investors in an email that the preattachment order would effectively end the litigation because the Tribal council would have no more financial resources to pay for the litigation against him.

Meanwhile, Stein continued to send correspondence on Tribe letterhead and, in spring 2007, he assisted in holding a new election for a new Tribal council. During that election, five new Tribe members were elected as Tribal council members. These newly elected members are the defendants in this case. Defendants (with attorney Stein's help) then opened offices in Santa Monica, and claimed to serve as the governing board for the Tribe. This new Tribal faction identifies itself as the "Santa Monica Tribe," and refers to the original Tribal council group (plaintiffs) as the "Downtown Nation."

On May 21, 2007, defendants sent a two-page letter to approximately 750 adult Tribe members. In the letter, defendants made several statements accusing plaintiffs of embezzling money from the Tribe. First, in discussing the recent Tribal election held by Stein, defendants stated: "The election made official the transfer of authority from the former Tribal Councilmen, *who embezzled \$900,000*, to we five Tribal Council members. *All of us were on the Financial Oversight Committee which tried to stop the embezzlement.*" (Italics added.) Defendants' letter also referred to arrest warrants issued in the Los Angeles litigation against the plaintiffs (and others including attorney Aronson and former Senator Polanco) and the fact that sheriff deputies seized the former Tribal council's office supplies and equipment. Defendants stated that these actions "are the

result of the March 21 court order to return \$812,500 of the \$900,000 *embezzled from the Tribe.*" (Italics added.) Defendants attached to the letter pictures of law enforcement personnel seizing plaintiffs' office equipment. Defendants also attached copies of several checks signed by attorney Aronson on November 8, and stated that these checks constitute "[e]vidence" of the "exact day that the embezzlement occurred."

Three months later, plaintiffs filed a complaint against defendants alleging a libel cause of action. The complaint alleged defendants "are engaged in a pattern and practice of bad faith behavior designed to undermine and usurp the authority of the Plaintiffs as the Tribe's duly elected Tribal Council and to further control the expenditure of funding received from investors to pay for expenses associated with the Tribe's efforts to gain legal entitlement to operate a casino project." As the factual basis for the libel claim, plaintiffs alleged defendants' May 21 letter contained three false statements: (1) plaintiffs "'embezzled \$900,000'"; (2) defendants "'tried to stop the embezzlement'"; and (3) "the court ordered Plaintiffs to 'return \$812,500 of the \$900,000 embezzled from the Tribe.'" Plaintiffs alleged that defendants published the letter with "malice and oppression and/or fraud" in that they "did not believe the truth of the statements but instead were using the slanderous publications for personal and financial gain"

Defendants, represented by attorney Stein, moved to strike the complaint under the anti-SLAPP statute. Defendants argued the alleged libelous statements were contained in a letter that was "a 'public forum'" and was written "'in connection with an issue of public interest,'" including the results of the election, efforts to obtain gaming rights, and the ongoing litigation to "recover some of the \$1 million embezzled by the [plaintiffs]."

(§ 425.16, subds. (e)(3) & (e)(4).) Defendants also argued that plaintiffs would be unable to show probable success because plaintiffs were limited public figures and could not prove the requisite malice, falsity of the statements, and special damages. Defendants additionally asserted the affirmative defenses of truth and the "common interest" privilege.

In support of their motion, defendants submitted a declaration by defendant Candelaria, who stated: "In fall 2006, I was a member of the [Tribe's] Financial Oversight Committee, which investigated the alleged embezzlement of \$1,072,000 from Santa Monica Tribe The Financial Oversight Committee investigation, in which I participated, showed that these individuals embezzled \$1,072,000 of investor funds from the Santa Monica Tribe and left to form a new tribal group with their ill-gotten money. [¶] . . . Before they left the Santa Monica Tribe to form the Downtown Nation, [plaintiffs] terminated both SMDC as well as our long-time accounting firm [Talley], which pinpointed the embezzlement of \$1,072,000 from the Santa Monica Tribe. The Financial Oversight Committee then took over the Santa Monica Tribe, now penniless, as its new Tribal Councilpersons. Since that time, the Santa Monica Tribal Council re-hired Talley, as well as SMDC and Mr. Stein. The Santa Monica Tribe has also entered into a new agreement with new investors The Santa Monica Tribe held an election in May 2007, to formalize the authority of a new Tribal Council and ratify the Constitution of our tribal group."

Candelaria also discussed the purposes of the May 21 letter: "Our underlying political motive of the mailer was for descendants of the historic Tribe to align

themselves with the Santa Monica Tribe, and not the competing Downtown Nation." She stated: "To the extent that a descendant was thinking of joining the Downtown Nation, we hoped the information would dissuade that descendant[] from doing so. Almost all of the members of the Downtown Nation were originally members of the Santa Monica Tribe, who followed the Downtown Plaintiffs to the Downtown Nation out of personal loyalty. It was of public interest to them, and to the members who remained behind in our organization, to learn these facts." Candelaria asserted the May 21 letter was "one of a series of such letters we sent to descendants of the [Tribe] explaining the situation and what was being done to put the Santa Monica Tribe back on its feet and recover the funds embezzled. We sent the Member Letter and all the letters in this series to over 750 adults in homes of over 1500 tribal members."

Defendants also submitted Stein's declaration, in which Stein accused plaintiffs and attorney Aronson of withdrawing the investor funds from the Tribe account "for their own personal benefit," in violation of the SMDC agreement. Defendants produced additional declarations and documentary evidence, the relevant portions of which will be discussed in connection with the legal analysis below.

In opposition to defendants' motion, plaintiffs argued the anti-SLAPP statute did not apply because defendants failed to meet their burden to show plaintiffs' libel claim arose from protected activity. Plaintiffs alternatively argued they proffered sufficient facts to show a probability they will prevail on the libel claim.

In support, plaintiffs submitted the declaration of their counsel, Aronson, who explained the reasons the Tribal council discharged Stein from his CEO position, and the

resulting need for the Tribe to use the investor funds to pay necessary expenses for the Tribe. Aronson also denied that any embezzlement had occurred, and identified the specific purposes of the challenged expenditures. She explained that the arrest warrants had been issued after she did not appear at a scheduled judgment debtor examination related to the prejudgment attachment order, but that she had not been given proper notice of the examination.

Plaintiffs also submitted the declaration of plaintiff Carmelo, who described the history of the Tribe's relationship with Stein, and stated that after the Tribe entered into the development agreement with SMDC, Stein engaged in improper conduct "designed to undermine and usurp the authority of the Tribe's duly elected Tribal Council." Carmelo specifically denied that plaintiffs embezzled any portion of Tribal funds, and asserted that the challenged expenditures were spent for proper Tribal purposes. She also said plaintiffs had no opportunity to express their views in the May 21 letter because the letter was "dictated and controlled by the Defendants" and plaintiffs "did not even have in our possession a member mailing list [to] respond to the false allegations."

After a hearing, the court denied defendants' motion. The court first ruled the libel claim was governed by the anti-SLAPP statute because the May 21 letter "was made in a public forum in connection with an issue of public interest." But the court found plaintiffs met their burden of establishing a probability they would prevail on their libel claim: "[p]laintiffs have made a sufficient showing that the alleged claim of embezzlement was false. There is no evidence before the court that Plaintiffs are limited-purpose public figures who have been drawn into a particular public controversy. In

addition, Plaintiffs have made a sufficient showing that the [May 21 letter] falsely accusing Plaintiffs of embezzlement was done with actual malice."

DISCUSSION

I. *Generally Applicable Legal Principles*

The Legislature enacted section 425.16 to deter lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) "Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought "'to prevent SLAPPs by ending them early and without great cost to the SLAPP target.'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312.) To achieve the goal of encouraging participation in matters of public significance, the statute must be construed broadly. (§ 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 199.)

In ruling on a defendant's anti-SLAPP motion, a court engages in a two-step analysis. (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 88.) First, the court must determine "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Ibid.*) Second, if the court finds this showing has been made, it must then dismiss the cause of action unless the plaintiff meets its burden to demonstrate a probability of prevailing on the claim. (*Ibid.*) On appeal, we conduct a de novo review of these issues. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

Because the trial court found in their favor on the first prong of the statutory analysis, defendants' appellate challenge focuses primarily on the court's ruling on the second prong, i.e., that the plaintiffs met their burden to show a probability of prevailing. For the reasons explained below, we determine the court's ruling was correct on the probability of prevailing issue. We thus need not reach plaintiffs' alternative responsive argument that the court erred in ruling that the anti-SLAPP statute governs the claims. As a general rule, appellate courts do not address issues whose resolution is unnecessary to the disposition of the appeal. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 845, fn. 5.) Further, we review the trial court's ruling and not its rationale. (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 80.) We thus assume for purposes of this opinion that the claims are governed by the anti-SLAPP statute.

II. *Plaintiffs Met Burden to Show a Prima Facie Case Supporting Libel Claim*

To meet their burden to show a probability of prevailing, plaintiffs were required to present sufficient evidence to support a judgment in their favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Similar to a summary judgment analysis, the court does not weigh the credibility or compare the strength of competing evidence, but merely determines if the plaintiff has ""demonstrate[d] that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."" (*Taus v. Loftus, supra*, 40 Cal.4th at pp. 713-714.)

The tort of libel "involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) Defendants contend plaintiffs failed to show a probability of prevailing on the elements of (1) constitutional malice; and (2) the falsity of the alleged defamatory statements. Defendants additionally contend the undisputed evidence supports the applicability of the common interest privilege defense. For the reasons explained below, we reject these contentions.

A. *Constitutional Malice*

To satisfy First Amendment requirements, a public official cannot recover on a libel claim unless the official proves the defendants made the allegedly false statement with "actual malice." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 280; *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1048; *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1163.) The malice requirement also applies to two categories of private plaintiffs. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351; *Annette F., supra*, 119 Cal.App.4th at p. 1163.) The first category "is the 'all purpose' public figure who has 'achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.'" (*Annette F., supra*, 119 Cal.App.4th at p. 1163.) "The second is the 'limited purpose' or 'vortex' public figure who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.'" (*Ibid.*) The rationale for treating public figures differently from private citizens is that "'public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic

opportunity to counteract false statements than private individuals normally enjoy.'" (*Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1272.) Additionally, "public figures have invited the attention and comment they receive and must accept certain necessary consequences of their choice, including the risk false and injurious statements will be made about them." (*Ibid.*)

Defendants concede plaintiffs have not achieved the type of "'pervasive fame or notoriety'" to be properly considered "'all purpose'" public figures. But they argue plaintiffs are "limited purpose" public figures based on their involvement in Tribal leadership disputes and the Los Angeles litigation.

Generally, a threshold issue to a finding of a limited public figure is the existence of a "public controversy." (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1577.) Defendants argue that their disputes with other Tribal members constitute a public controversy, citing our decision in *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 478-480. However, in the portion of *Damon* relied on by defendants, we addressed a different legal question—the meaning of an "issue of public interest" under section 425.16, subdivision (e)(3). (*Damon, supra*, 85 Cal.App.4th at pp. 478-480.) The statutory issue of whether a particular claim is governed by the anti-SLAPP procedure under section 425.16, subdivision (e)(3) and the issue of whether a matter constitutes a "public controversy" for purposes of the constitutional libel analysis are not necessarily equivalent. Moreover, unlike in *Damon*, there was no evidence in this case the leadership disputes were of a "public" nature, i.e., that they were of importance to, or even known by, the majority of the affected community (the Tribe members).

Further, even assuming the Tribal leadership dispute could be viewed as a "public controversy," this does not answer the question as to whether plaintiffs became "limited public figures" in the context of this controversy. To satisfy this requirement, the plaintiff must have voluntarily "thrust" himself "into the public eye" to "influence the resolution" of the public issue. (*Ampex Corp. v. Cargle*, *supra*, 128 Cal.App.4th at p. 1577.) The evidence presented in the anti-SLAPP proceedings does not support that plaintiffs acted in this manner.

Plaintiffs' dispute with defendants arose from their private disagreement with attorney Stein, and their decision to terminate their relationship with him. After Stein responded by locking them out of their offices, plaintiffs filed a lawsuit against Stein and his company. This triggered Stein to conduct his own election during which defendants were selected as the new Tribal council. Defendants then sent a mass mailing to Tribe members accusing plaintiffs of embezzling funds from the Tribe. During the course of these events, plaintiffs did nothing to purposefully draw public attention to themselves, or to purposefully inject themselves into a public controversy. At most plaintiffs filed a private lawsuit against their development partner, and opened new headquarters. This is not the type of conduct that transforms a private citizen into a public figure for purposes of First Amendment defamation analysis.

In this regard, this case is very different from the cases relied upon by defendants. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13 (*Gilbert*); *Mosesian v. McClatchy Newspapers* (1991) 233 Cal.App.3d 1685 (*Mosesian*); *Kaufman v. Fidelity Fed. Sav. & Loan Assn.* (1983) 140 Cal.App.3d 913 (*Kaufman*).)

In *Gilbert*, a prominent and widely-known plastic surgeon sued a former patient, alleging defamation based on the patient's maintaining a website that accused the surgeon of negligence. (*Gilbert, supra*, 147 Cal.App.4th at p. 23.) The court found the plastic surgeon was an "archetypical example of a 'limited purpose'" public figure based on facts showing the surgeon "had thrust himself" into the national public debate pertaining to the merits of plastic surgery "by appearing on local television shows as well as writing numerous articles in medical journals and beauty magazines, touting the virtues of cosmetic reconstructive surgery" (*Id.* at p. 25.) In *Mosesian*, the public controversy was the subject of at least 31 newspaper articles and numerous radio and television news commentaries, and the plaintiff held several press conferences, appeared at numerous public hearings and was widely quoted in the media. (*Mosesian, supra*, 233 Cal.App.3d at pp. 1689-1693.) The *Mosesian* court held the plaintiff was a limited public figure "by his own voluntary and at times bombastic efforts . . . to have placed himself [in the public controversy,]" and emphasized that the plaintiff "enjoyed 'access to the channels of effective communication' regarding his dispute and thus had a 'realistic opportunity to counteract false statements.'" (*Id.* at p. 1701; see also *Kaufman, supra*, 140 Cal.App.3d at pp. 920-921 [finding plaintiff a limited public figure based on facts showing he had voluntarily injected himself into a zoning dispute by making numerous attempts to exert political pressure on the zoning officials to deny plaintiffs' requested zoning changes].)

Unlike in *Gilbert*, *Mosesian*, and *Kaufman*, there was no evidence the Tribal leadership controversy was the subject of media attention. Moreover, plaintiffs presented evidence showing they had no access to the Tribe's mailing list, and thus had no practical

means of asserting their own viewpoints to the Tribal members. Additionally, by serving on the Tribal council for a Tribe that was not recognized by the federal government, plaintiffs did not assume a prominent role in society or invite attention and comment that can be reasonably interpreted as understanding that they would be accepting the risk of false and injurious statements being made about them.

On the record before us, the evidence does not support that plaintiffs were limited public figures. Plaintiffs thus were not required to make a prima facie case of constitutional malice, or to prove special damages.

B. Truth of Alleged Defamatory Statements

Defendants next contend plaintiffs failed to show a probability of prevailing on the element of the falsity of the alleged defamatory statements.

Truth is an absolute defense to a libel claim. (*Smith v. Maldonado, supra*, 72 Cal.App.4th at p. 648.) Generally, the defendant bears the burden of proving the truth of the allegedly defamatory statements. (*Id.* at p. 646, fn. 5.) However, the burden shifts if the statements were a matter of "public concern." (*Ibid.*; see *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767; *Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749, 751, 761-762.) Assuming, without deciding, that the burden shifts to plaintiffs to prove the falsity of the statements, we conclude plaintiffs met their burden to show the falsity of the statements.

In the May 21 letter, defendants accused plaintiffs of financial wrongdoing by "embezzle[ing]" money from the Tribe. (Italics added.) As acknowledged by defendants, the commonly understood meaning of embezzlement is that a person "appropriate[s] . . .

property . . . fraudulently to one's own use." (Webster's Collegiate Dict. (11th ed. 2006) p. 406.) Plaintiffs presented evidence showing they did not wrongfully appropriate money from the Tribe and they did not improperly take any funds for their own use.

First, Aronson, who had sole authority to sign checks for the Tribe, denied that any embezzlement had occurred. She stated that "as the only signatory on the Tribe's bank accounts, I am personally aware of all expenditures made and can attest to the fact that no monies were embezzled by myself or Plaintiffs. . . . The expenditures that were made in November of 2006 . . . were incurred as a result of having to replace checks that bounced due to Stein's placing a freeze on the Tribe's accounts a month prior, \$350,000 that the Tribe had to spend on legal fees to fight the Stein litigations in Los Angeles, and expenses that were incurred by the Tribe in having to quickly set up a new office as a result of being locked out by Stein."

Plaintiff Carmelo likewise said that: "the statements made by Defendants [in the May 21 letter] were false. Neither myself nor any of the other Plaintiffs 'embezzled' any portion of the Tribe's monies. To the contrary, we were forced to spend \$350,000 on legal fees to fight the Stein litigations in Los Angeles. Further, as required by the investor budget which had actually been prepared by Attorney Stein during his tenure as CEO, \$80,000 was spent on political contributions, \$250,000 was spent on six months of employee salaries, \$100,000 was spent on legal fees for formation of the Tribe's Constitution and in obtaining federal recognition, \$75,000 was spent on tribal professionals, including but not limited to lobbyist fees, \$20,000 was spent on Member Meeting and Constitutional Committee meetings, and the rest was spent on office

overhead, including but not limited to office rent, telephone, internet and website services, and the purchase of computers, office supplies, etc. Not one penny of the Tribe's monies were paid to or on behalf of Plaintiffs herein other than six months of their regular salary."

Additionally, plaintiffs presented facts showing the falsity of defendants' statement that a court had ordered plaintiffs to "*return*" the money "*embezzled from the Tribe*." (Italics added.) Defendants' statement suggested: (1) a court had made a finding that plaintiffs had "embezzled" Tribe funds; and (2) the court had ordered these funds returned to the Tribe. Plaintiffs submitted court documents showing these assertions to be untrue. The court's prejudgment attachment order merely allowed SMDC to place the Tribe's assets in a protective hold pending the outcome of the litigation. It did not reflect a judicial finding that plaintiffs had embezzled the funds. (See § 484.100; *Loeb & Loeb v. Beverly Glen Music, Inc.* (1985) 166 Cal.App.3d 1110, 1117.) Moreover, even if SMDC was successful in the litigation, SMDC (and not the Tribe) would benefit from the order, i.e., SMDC would recover title to the Tribe assets.

In contending that plaintiffs did not meet their burden to show the statements were false, defendants challenge the weight of plaintiffs' evidence. For example, they argue that plaintiffs' declarations are "self-serving" and are not supported by sufficient documentary evidence. However, in determining whether parties meet their burden on the second prong of the anti-SLAPP analysis, a court does not weigh the evidence or assess the credibility of the declarations. Rather, the court merely determines whether there is sufficient evidence for a jury to find in the plaintiffs' favor. (*Taus v. Loftus*,

supra, 40 Cal.4th at p. 714.) In this case, plaintiffs presented sufficient evidence to establish a prima facie case that they did not embezzle any money from the Tribe, and that there had been no judicial finding that plaintiffs had embezzled the funds.

Defendants also contend they produced conclusive evidence of the embezzlement by showing plaintiffs "'withdrew' tribal funds and did not use those funds to pay tribal expenses and bills owed, including amounts due to SMDC." In support, they cite to the declarations of Stein and defendant Candelaria, an accounting report, the declaration of a vice president of Gilmore Bank, defendants' May 21 letter, and the court's prejudgment attachment order. We have reviewed each of these documents, and find they do not conclusively refute plaintiffs' evidence that the challenged expenditures were used for proper Tribe-related purposes, and that the money was not used to personally benefit the plaintiffs. For example, the fact that the former Tribal council members (plaintiffs) adopted resolutions to remove Stein from signatory authority on bank accounts or that plaintiffs terminated the Tribe's relationship with an accountant selected by Stein does not show they embezzled money. Plaintiffs presented evidence that they removed Stein's name from the bank accounts based on his alleged improper conduct. Assuming the truth of this evidence, plaintiffs' conduct does not show they did this for the purpose of embezzling money.

Defendants additionally contend a statement is not defamatory if the "substance" or "gist" of the statement is true, even if portions of the statement are not absolutely accurate. We agree that a defendant need not justify the literal truth of every word of the allegedly defamatory matter. It is sufficient if the defendant proves true the *substance* of

the charge, irrespective of slight inaccuracy in the details "so long as the imputation is substantially true so as to justify the 'gist or sting' of the remark." (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 581-582.)

This principle, however, does not help defendants here. For purposes of the anti-SLAPP analysis, plaintiffs have produced sufficient evidence showing the "gist" of the statements was untrue. The May 21 letter essentially accused plaintiffs of taking money from the Tribe for their own use, and implied that a court had found plaintiffs to be guilty of this conduct, resulting in law enforcement action being taken against plaintiffs. Under plaintiffs' version of the evidence, these statements were not only technically incorrect, they were substantively and substantially false.

C. Common Interest Privilege

Defendants next contend the undisputed evidence establishes their statements were protected under the "common interest" privilege. (Civ. Code, § 47, subd. (c)(1).)

Under Civil Code section 47, subdivision (c)(1), a "privileged publication" is one that is made in "a communication, without malice, to a person interested therein, . . . by one who is also interested. . . ." This privilege protects communications in "which the speaker and hearer shared an interest or duty." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 914.) Defendants' statements to the Tribal membership about the alleged misdeeds of a competing group of leaders arguably fall within this statutory common-interest privilege. The parties shared a common interest in the proper governance of the Tribe. Defendants sought to communicate their view that they were the true leaders of the Tribe, and to dissuade the Tribe members from joining a competing

faction led by the plaintiffs. This communication was of the type that was intended to be protected by the common interest privilege.

However, the common interest privilege is a qualified, not an absolute, defense. (Civ. Code, § 47, subd. (c).) On an anti-SLAPP motion, once the defendant demonstrates that the challenged statements were made on a privileged occasion, the plaintiff "bears the burden of establishing a prima facie case that these statements were made with "[a]ctual malice." [Citation.]" (*Taus v. Loftus, supra*, 40 Cal.4th at p. 721; see *Kashian v. Harriman, supra*, 98 Cal.App.4th at pp. 914-915.) The malice necessary to defeat a qualified statutory privilege is established by showing one of two elements: (1) ""the publication was motivated by hatred or ill will towards the plaintiff""; or (2) ""the defendant lacked reasonable grounds for belief in the truth of the publication and thereafter acted in reckless disregard of the plaintiff's rights [citations]."" (*Taus, supra*, at p. 721.) With respect to the first element, the facts satisfy this standard if they show "a willingness to vex, annoy or injure another person." (*Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 997.)

Plaintiffs established a prima facie case on the first prong, i.e., that defendants acted for an improper purpose in accusing plaintiffs of embezzlement. The evidence shows Stein had presented the Tribe with a plan to earn substantial profits by obtaining federal recognition of the Tribe and then obtaining governmental approval to operate a casino in the Los Angeles area. Both defendants and plaintiffs were competing to become the recognized Tribal leaders of this potentially profitable venture. In her declaration, defendant Candelaria admits that a primary purpose of the May 21 letter was

to "dissuade" the Tribal members from belonging to plaintiffs' tribal faction and to instead join defendants' group. She stated that defendants wrote the letter in an effort to persuade Tribe members "to align themselves with [defendants], and not the competing [tribal faction led by plaintiffs]."

Under this evidence, a factfinder could infer that defendants falsely accused plaintiffs of embezzling Tribe funds with the intent to undermine plaintiffs' credibility and standing in the community, in order to enhance defendants' own position in the Tribal community. The evidence showing defendants wished to promote themselves at the expense of plaintiffs to obtain financial and other benefits supports a finding that the statements were made with statutory malice, and were motivated by ill will toward plaintiffs. (See *Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 414 [substantial evidence supported a malice finding where defendant made false statements to promote his own interests and to transfer the blame to plaintiff].)

In arguing that plaintiffs failed to meet their burden to show malice, plaintiffs rely on *Annette F. v. Sharon S.*, *supra*, 119 Cal.App.4th 1146. In that case, two former domestic partners (Annette and Sharon) had been involved in a highly publicized litigation involving second-parent adoption. Annette sued Sharon for libel based on statements Sharon made in a letter to a newspaper calling Annette a "convicted perpetrator of domestic violence against me." (*Id.* at p. 1158, italics omitted.) To show she made the statement without malice, Sharon relied on undisputed evidence that the family court found Annette had committed domestic violence against her. (*Id.* at p. 1168.) Sharon also submitted her own declaration in which she stated that she had no

legal training and did not consult with an attorney before she wrote the letter, and that she believed the statement to be true based on her "'understanding of the legal proceedings involving Annette's domestic violence against me.'" (*Ibid.*) On this record, this court found Annette failed to show a probability of prevailing on the merits of the constitutional malice element of her libel claim. We reasoned that although the word "convicted" was not technically correct because there had been no criminal proceedings against Annette, Sharon's statements that, as a layperson, she believed this word accurately reflected the proceedings, was "not so implausible as to support an inference of actual malice." (*Id.* at p. 1168.)

Annette F. is inapposite because it concerned only the constitutional malice standard (applicable to a limited public purpose figure) which requires a showing that the defendant knew the statement was false or acted with reckless disregard of the truth. *Annette F.*, *supra*, 119 Cal.App.4th at pp. 1162-1166, 1167.) As discussed above, the statutory malice standard applies also when the defendant acts for an improper purpose toward the plaintiff. (*Taus v. Loftus*, *supra*, 40 Cal.4th at p. 721.)

Moreover, this case is factually distinguishable. Unlike *Annette F.*, each defendant here did not present a declaration explaining the basis for a claim that he or she honestly believed plaintiffs had "embezzled" money from the Tribe, nor did defendants deny consulting an attorney before asserting that charge in the May 21 letter. Although one of the defendants submitted a declaration suggesting her belief that plaintiffs had embezzled money was based on an investigation by the Tribe's financial oversight committee, plaintiffs refuted this assertion by presenting evidence showing that this

committee was controlled by Stein and that defendants knew the truth because they had attended the November 2006 meeting during which plaintiffs had properly accounted for all of the Tribal expenditures.

III. *Conclusion*

For purposes of the "'minimal merit' required to defeat a SLAPP motion," plaintiffs produced sufficient evidence to establish a prima facie case of libel, and defendants did not show a complete defense to that claim. (See *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1149, fn. omitted.) In reaching this conclusion, we do not intend to suggest any opinion as to the ultimate resolution of the case. Based on the evidence presented at trial, a factfinder may ultimately conclude that plaintiffs cannot meet their burden of proof to prove their libel claim, or that defendants can establish a complete defense to the claim. But at the very earliest stage of the litigation, plaintiffs produced sufficient evidence to avoid a motion to strike.

DISPOSITION

Order affirmed. Appellants to bear respondents' costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.